RECEIVED
OCT 12 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

HENRY ALBERT SMITH,

APPELLANT,

VS.

JAMES C. WOODARD AND MEMBERS OF THE STATE OF NORTH CAROLINA PAROLE COMMISSION,

APPELLEES.

NO. 78-5551

PETITION FOR WRIT OF CERTIORARI PURSUANT TO 28 U.S.C. § 1651(a). DECIDED ON SEPTEMBER 11, 1978, IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. CASE NO. 78-8064.

HENRY ALBERT SMITH
NO. 20128-92
P. O. BOX 217
YANCEYVILLE, NORTH CAROLINA 27379
Per se

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WASHINGTON, D. C.

HENRY ALBERT SMITH, APPELLANT, VS. JAMES C. WOODARD AND MEMBERS OF THE STATE OF NORTH CAROLINA PAROLE COMMISSION, APPELLEES.	78-5551 NO. _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes the appellant Henry Albert Smith and moves the Court to proceed in this action in forma pauperis pursuant to 28 U. S. C. § 1915 (d) without first being required to pre-pay fees and costs or otherwise being required to give security therefor. In support of this motion appellant has attached his Affidavit of Poverty hereto.

Respectfully submitted,

s/s Henry Albert Smith
Appellant, pro se

Dated: August 9, 1978.

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WASHINGTON, D. C.

78-5551

HENRY ALBERT SMITH,

APPELLANT,

VS.

NO. _____

JAMES C. WOODARD AND MEMBERS OF THE STATE OF NORTH CAROLINA PAROLE COMMISSION,

APPELLEES.

MOTION FOR THE APPOINTMENT OF COUNSEL

TO: THE CHIEF JUSTICE AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes the appellant Henry Albert Smith and respectfully motions for legal assistance and give credence to this motion, states: this action is brought in good faith; Appellant is a poor person and does not possess sufficient means to employ the services of legal counsel; Appellant is a layman unskilled in the law and does not possess the legal knowledge and skill which is imperative to litigate this action. Wherefore, Appellant respectfully moves the Honorable Court pursuant to 28 U.S.C. §1915(d) to appoint counsel to aid and represent him in the presentation of his cause.

Dated: August 9, 1978.

Respectfully submitted,

/s/ Henry Albert Smith
Appellant, pro se

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WASHINGTON, D. C.

78-5551

HENRY ALBERT SMITH,

APPELLANT,

VS.

NO. _____

JAMES C. WOODARD AND MEMBERS OF THE STATE OF NORTH CAROLINA PAROLE COMMISSION,

APPELLEES.

PETITION FOR WRIT OF CERTIORARI UNDER 28 U. S. C. §§ 1651(a)

TO: THE CHIEF JUSTICE AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

1.

Comes the appellant Henry Albert Smith, in propria persona, and moves the Court for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming the decision of the United States District Court for the Eastern District of North Carolina in the case. A copy of the opinion of the United States Court of Appeals for the Fourth Circuit filed September 11, 1978 and certified on September 11, 1978, is attached hereto.

STATEMENT OF THE CASE

2.

The appellant was tried in the Superior Court of Wake County, North Carolina, at the May 30th 1975 Session before the Honorable Thomas H. Lee, Judge Presiding and a jury. The appellant on a bill of indictment charging him with assault with a deadly weapon with intent to kill inflicting serious injury. (R p 38). The appellant was sentenced to a term of imprisonment in the State's Prison of a period of not less than 8 nor more than 10 years. (R pp 39, 40).

3.

Appellant was represented at the trial of the action by Mr. Gerald L. Bass, Esquire, Court-appointed attorney of the Wake County Bar.

4.

That the aforesaid verdict and judgment was appealed to the North Carolina Court of Appeals, and in January 1976, that court found no error in the trial below.

State v. Smith, ___ N. C. App. _____.

5.

NOTE: The statement of the case set out above is not the case presently before the Court for further review on writ of certiorari.

6.

The case that is presently before the Court is from a Civil Action that the appellant filed in the United States District Court for the Eastern District of North Carolina, under Sections 42 U.S.C. § 1983, 28 U.S.C. § 1343 and 28 U.S.C. §§ 2201 and 2202, against the appellees aforesaid, for denying parole to him by taking into consideration the following: (1) Appellant's prior convictions of assault and burglary, which charges he was not convicted of: (2) By the use of parole criteria which are vague and ambiguous, Billiteri v. United States Board of Parole, 385 F. Supp. 1217 (W.D.N.Y. 1974): (3) Failure to apply "due process" to the parole hearing, Childs v. United States Board of Parole, 511 F. 2d 1270 (D.C. Cir. 1974): (4) Denying parole to him because he was in Close Custody and not in Honor Grade: (5) By considering the appellant as being of an assaultive nature, in the absence of substantive evidence to support such a claim: (6) By taking into consideration that a detaindr had been filed against him by the Adult Probation Authorities, Columbus, Ohio, as a parole violator from a 1963 conviction for murder in the second degree in that State, which detainer, if one had been filed against appellant, it was not served on him within one year as required under Section 1(b) and (c) of the Uniform Mandatory Disposition of Detainers Act, 1958): (7) By the imposition and use of appellant's 1963 conviction for murder in the second degree as a basis to support such a denial, and (8) By taking into consideration the nature and circumstances of him crime, the 8-10 year sentence mentioned in the statement of the case above, which is, or appear to be, equivalent to the phrase "the seriousness of his crime" and using it as a basis to support such a denial. See a copy of Ms. Mary R. Logan's letter to appellant dated March 17, 1977, designed as Exhibit B, attached hereto. The matter in controversy exceeds, exclusive of interest and costs, the amount of $10,000,00. Appellant now seeks discretionary review of the decision of the United States Court of Appeals for the Fourth Circuit.

7.

GROUNDS FOR DISCRETIONARY REVIEW

Appellant's grounds for seeking discretionary review are as follows:

(a) That the United States Court of Appeals for the Fourth Circuit erred as a matter of law by its failure to apply applicable constitutional provisions and statutes in this case.

(b) That the United States Court of Appeals for the Fourth Circuit erred in denying the appellant's Sixth Amendment rights to counsel for the presentation of his cause, by denying his motion for the appointment of counsel.

(c) That the United States Court of Appeals for the Fourth Circuit erred in basing its decision with the decision of the United States District Court for the Eastern District of North Carolina without reaching an independent decision on the case.

(d) That the appellant's rights to be free from cruel and unusual punishment, as guaranteed to him in the Eighth Amendment was violated and the opinion on the United States Court of Appeals for the Fourth Circuit regarding that issue was either erroneous, misrepresented or moot. Morris v. United States, 399 F. Supp. 720 (E.D. VA. 1975).

That the record will affirmatively show that the appellees, in denying parole to appellant, erroneously took into consideration that he has had prior convictions of assault and burglary. Appellant admits that those charges may have been brought against his in 1952 or 1953 while he was living in Niagara Falls, New York but that if they were, they were subsequently dismissed and therefore no convictions resulted therefrom. The fact that the appellees, in denying parole to appellant, did take into consideration that he has had prior convictions of assault and burglary, were the consideration of invalid past convictions, Wren v. United States Board of Parole, 389 F. Supp. 398 (N.D. Ga. 1975), in violation of appellant's constitutional rights to due process of law, regardless of any statutory or discretionary provisions, and the opinion of the United States Court of Appeals for the Fourth Circuit regarding that issue is erroneous and in direct opposition to the decisions of the United States Supreme Court in Morris v. United States, supra., and Wren v. United States Board of Parole, supra.

That the appellant's constitutional rights to due process of law and equal protection of the law, as guaranteed to him in the Fifth and Fourteenth Amendments have been flagrantly violated and the decision of the United States Court of Appeals for the Fourth Circuit regarding those issues were either erroneous, misrepresented or moot.

The record is clear in this particular case that the appellees, in denying parole to appellant, erroneously took into consideration his previous criminal record, his assaultive nature, his custody grade, that is, Close Custody; his prior convictions of

assault, burglary and murder in the second degree, his previous criminal involvement and not being in Honor Grade, and using the same as a basis for such a denial. Whereas, these statements are conclusory statements not supported by substantive evidence and are insufficient for the utilization by the appellees to justify their denial of parole to appellant, Robinson v. United States Board of Parole, 403 F. Supp. 638 (W.D.N.Y. 1975); Kholman v. Norton, 380 F. Supp. 1073, 1075 (D. Conn. 1974), and the opinion of the United States Court of Appeals for the Fourth Circuit regarding those issues are either erroneous, misrepresented or moot. For more information stating the reasons as to why the appellant was denied parole, see Exhibit A, attached hereto.

That the appellant's constitutional rights, as guaranteed to him in the Fifth and Fourteenth Amendments, have been flagrantly violated by the action of the appellees, and subjected him to be twice put in jeopardy for the same offense, when they erroneously took into consideration the following, in pertinent part:

> "...Because of the nature and circumstances of your crime, your custody grade and the fact that you have a detainer filed against you by the Adult Probation Authorities, Columbus, Ohio; we do not feel that you deserve parole consideration at this time. Sinceeyou are wanted on a life sentence with the Columbus, Ohio Authorities; ...."

For more information relating to the above quoted matter, see Exhibit B, Attached hereto.

Again, the opinion of the UNITED STATES COURT OF APPEALS FOR THE CIRCUIT regarding those issues were either erroneous, overlooked, misrepresented or moot.

That the above quoted statement that: "...Since you are wanted on a life sentence with the Columbus, Ohio Authorities; ....", is referring to appellant's February 7, 1963 conviction for murder in the second degree in Columbus, Ohio, wherein he was sentenced to serve a term of imprisonment of 10 years to life in the Ohio State Penitentiary. However, after the appellant served the minimum of that sentence, 10 years, in 1970 or 1971, he was paroled from Ohio to Raleigh, North Carolina, his home, where he was to be on parole for 5 years. Therefore any reference made by the appellees regarding that conviction and sentence to use as a basis to deny the appellant parole, would certainly put him in double jeopardy, in violation of his constitutional rights, as guaranteed to him in the Fifth and Fourteenth Amendments. It follows that the appellees have erroneously misinterpreted a very significant fact in this case, in that the appellant is not wanted on a life sentence with the Columbus, Ohio Authorities. Rather, if he

is wanted at all, he could only be wanted as a parole violator as a result of his current conviction and sentence. That, even if the appellant was wanted on a life sentence in Ohio, in the sense the appellees have made it appear and a detainer had been filed against him from that State and served on him in accordance with Section 1(b) and (c) of the Uniform Mandatory Disposition of Detainers Act (1958), it would still be a frivolous basis to employ and use to deny him parole. These points of facts were either overlooked or misrepresented by both the United States Court of Appeals for the Fourth Circuit and also by the United States District Court for the Eastern District of North Carolina. (Emphasis added).

To the Close Custody issue, the appellant contended that under the circumstances, his will and his desire could not or should not have been a controlling fact to use as a basis to deny him parole. It must need be noted here that the North Carolina State Penitentiary is the State's maximum security facility, and that when the appellant entered that facility on his 8-10 year sentence, May 30, 1975, that he entered as a "Safekeeper" since he could not post the $10,000.00 appeal bond that was set in the case. This safekeeper must then be some form of custody level in itself. In any event, it appears to be the general rule or policy of the appellees after a certain period of time may, in their discretion, change the prisoner's custody level from whatever custody level he may have been in, to either Close Custody, Medium Custody or Honor Grade. The important point here is that after the appellees put the appellant in Close Custody and then use that Close Custody level as a basis to deny him parole, then their action would certainly go far beyond acts of mere discretion.

To the issue of appellant being denied parole by the appellees on the basis of his "assaultive nature", he contended that such a statement is a conclusory statement not supported by the record since he has had only one conviction of assault. Robinson v. United States Board of Parole, supra., and Kholman v. Norton, supra. Again, the decision of the United States Court of Appeals for the Fourth Circuit regarding that issue was either erroneous, overlooked, misrepresented or moot.

That, in the spring of 1976 Congress enacted into law the "Parole Commission and Reorganization Act," 18 U.S.C. § 4201 et seq. (90 Stat. 219, Pub. L. 94-233). Under this new Act are many rights which represent, for the most part, a codification of many recent federal court decisions. However, these federal regulations do not apply to state prisoners, because they are federal laws, but because they do represent a codification of many federal court decisions that dealt with the parole process, the appellant urged the courts to apply these federal laws, including Section 1(b) and (c)

of the Uniform Mandatory Disposition of Detainers Act, (1958), to his case, because the appellees' parole criteria for the granting and/or denial of parole to prisoners under its jurisdiction, appears to be inconsistent with these federal laws, or their application thereof, which may invariably account for the overcrowded population of the North Carolina State penal system. Rather than set out the complete Act, below are listed summaries of the more important provisions and rights within the parole process:

1) At least 30 days prior to your parole hearing you must be provided with: (1) written notice of the time and place of the proceeding and (2) reasonable access to any reports or other documents to be used by the Commission in making its decision. 18 U.S.C. s/s 4206,

n) You are entitled to representation at your parole hearing. The rules and regulations that such representatives must comply with shall be promulgated by the Commission. Such rules shall not exclude lawyers as a group. 18 U.S.C.s/s 4208,

o) You are entitled to appear and speek in your own behalf at the hearing.

p) A full and complete record of every proceeding must be kept by the Commission and upon request the Commission must make this record available to you. 18 U.S.C. s/s 4208, and

q) If you are denied parole a conference should be set up between you and the Commission, or the examiners thereof, to explain the reasons why you were denied. This conference should include advice to you as to what steps you might take to enhance your chances of making parole at your next hearing. 18 U.S.C. s/s 4208.

That the application of the Parole Commission and Reorgainzation Act, 18 U.S.C. § 4201 et seq. (90 Stat. 219, Pub. L. 94-233), to state parole proceedings seems to be more in keeping with the Ancient Precedents, which states, in pertinent part:

> "And I charge you judges at this time, saying Hear the causes between your brethern, and judge righteously between every man and his brother, and the stranger that is with him.
>
> "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it." __Deuteronomy, 1, 16-17.
>
> "We shall not make any justiciaries, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it." ___Magna Charta, XLV.

The appellant further contended, with respect to the detainer mentioned above, that what he received from the appellees was not a detainer: that it was only a copy of a letter dated October 26, 1976 from the appellees to the Adult Probation Authorities, Columbus, Ohio, informing them of his 8-10 year current sentence and was therefore not a valid detainer. See a copy of that letter, designed as Exhibit C,

attached hereto. (Emphasis added).

That, the record will show that the appellant requested the appellees, through the court below, to submit their regulation governing parole procedure and criteria for the granting and/or denial of parole to prisoners of each institution under its jurisdiction, and a list of proposed procedures and criteria that would comply with the Court's declaration and order of the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Accordingly, the appellees submitted their parole proceedings and criteria, which, the appellant admits, if followed, would have grately enhanced his chances for making parole. Whereas, the appellees could not and did not in this p-articular case, submit parole proceedings and criteria consistent with the basis upon which he was denied parole.

Appellant contends that for reasons hereinabove set forth that issues raised in this case under the Fifth, Sixth, Eighth and Fourteenth Amendments involves legal principles of major significance to the jurisprudence of the State of North Carolina and that the decision of the United States Court of Appeals for the Fourth Circuit regarding those issues appears to be in conflict with decisions of the United States Supreme Court, supra.

Wherefore, the appellant respectfully request that the Supreme Court certify this cause for discretionary review upon the grounds set out above, and request other and further relief that the Court deems to be appropriate and just.

Respectfully submitted;

s/s Henry Albert Smith

Appellant, Pro se.

FORMA PAUPERIS AFFIDAVIT

I own nothing of value except the following:

	VALUE
Land	$ 0
Automobile and personal property	$ 0
Bank Deposits	$ 0
MONEY .....(See.attached.balance.card).....	$ 0

Inmate Prison Trust Fund Balance Card attached and made a part hereof.

I certify that I am a pauper and unable to pay the costs and fees or give security therefor to prosecute this petition, and therefore I request leave to proceed in forma pauperis.

s/s Henry Albert Smith

STATE OF NORTH CAROLINA)
)
COUNTY OF CASWELL) SS: VERIFICATION

Henry Albert Smith, being first duly sworn under oath, deposes and says: That he has subscribed to the above and states that the information contained therein is true and correct to the best of his knowledge and belief.

s/s Henry Albert Smith

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 9 DAY OF October, 1978.

Patricia M. Teague
NOTARY

My commission expires June 15 1983

EXHIBIT A. COPY

State of North Carolina
Parole Commission
831 West Morgan Street
Raleigh 27603

Telephone 733-2111

James B. Hunt, Jr.
Governor
Jack Scism
Chairman

Commissioners
Grady D. Davis
C. Dempsey McDaniel
James E. Cline
Mrs. Isabel S. Holmes

March 3, 1977

Mr. Henry Albert Smith, 20128-92, MRL
Central 3100

Dear Mr. Smith:

The Parole commission has carefully considered your case and concluded that parole should not be granted at this time. The Commission, in reaching its decision, took into consideration your previous criminal record, your assaultive nature and your custody grade.

Our records indicate that you have p-rior convictions of Assault, Burglary and Murder In The Second Degree. You are in Close Custody, therefore, making you ineligible for parole consideration on your parole eligibility date May 29, 1977.

Because of your previous criminal involvement and your assaultive nature the Commission was unable to conclude that there is reasonable probability that you will live and remain in liberty without violating the law if paroled at this time. Because you are not now a Honor Grade, the Commission feels that further consideration of your case should be deferred until you have been promoted to that custody level and demonstrated your willingness and ability to handle the additional freedoms and responsibilities of that custody level. The Commission is of the opinion that your continued correctional treatment will substantially enhance your capacity to lead a law-abiding life when released at a later date.

Your file will be reviewed again on February 25, 1978.

Sincerely,

s/s
Mary R. Logan

Case Analyst

MRL/tw

cc: Unit Superintendent

EXHIBIT B. COPY

STATE OF NORTH CAROLINA
PAROLE COMMISSION
831 WEST MORGAN STREET
RALEIGH, 27603

JAMES L. HUNT, JR.
GOVERNOR
JACK SCISM
CHAIRMAN

COMMISSIONERS
GRADY D. DAVIS
C. DEMPSEY MCDANIEL
JAMES E. CLINE
MRS. ISABEL S. HOLMES

MARCH 17, 1977

MR. HENRY ALBERT SMITH, 20128-92, MRL
CENTRAL 3100

Dear Mr. Smith:

According to our FBI Record, you were charged with assault and Second Degree Burglary during 1952 while living in Niagara Falls, New York. You were held for trial and indictment was dismissed.

Because of the nature and circumstances of your crime, your custody grade and the fact that you have a detainer against you by the Adult Probation Authorities, Columbus, Ohio; we do not feel that you deserve parole consideration at this time. Since you wanted on a like sentence with the Columbus, Ohio Authorities; there is a possibility that the Commission will review your file and consider you for parole to this detainer on your next scheduled review February 25, 1978.

Just as soon as you have been promoted to Medium Custody, please advise this office and we will take your case to the Commission in order to determine whether they want to parole you to this detainer.

Sincerely,

/s/ _____
Mary R. Logan

Case Analyst

MRL/ bw

EXHIBIT C.

Department of Correction
Division of Prisons
831 West Morgan Street
Raleigh, N. C. 27603

COPY

October 26, 1976

Ralph D. Edwards
Director of Prisons

David L. Jones
Secretary

MRU
DETAINER
3100

Don A. Carlisle
Duputy Administrator
Adult Parole Authority
1050 Freeway Drive, N.
Columbus, Ohio 43229

Re: Henry Albert Smith 55778-324-20128-92
Your Detainer: Parole Violator (Life sentence for murder, 2nd Degree)

(Institution No. 0C1 116569)

We have received and recorded your detainer/notification. During the month preceeding discharge, we will nitify you of the final release date.

Present Sentence: 8-10 years
Additional Sentence(s) None
Location: Central Prison, Raleigh, North Carolina
Previous Notification or Detainers: None

It is requested that you notify this office when disposition is made of your charge. Please include the inmate's prison number on all correspondence pertaining to him. It is Departmental policy to deny inmates with serious detainers minimum custody privileges such as work release, home leave, community leave, study release, and other outside activities. This notice is particularly important where you decide not to prosecute or the charges are otherwise disposed of in a manner favorable to the inmate involved.

Sincerely yours,

s/ _____
Ben L. Baker, Supervisor
Combined Records

cc: Unit Head
Inmate /
Combined Records

COPY

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

WILLIAM K. SLATE, II
CLERK

TELEPHONE 782-2213
AREA CODE 804
TENTH AND MAIN STREETS
RICHMOND, VIRGINIA 23219

September 11, 1978

TO: Mr. Henry Albert Smith
Jacob. L. Safron, Esquire

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 78-8064 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

Please be advised that the policy of this court requires that petitions for rehearing, regardless whether the case was fee paid or in forma pauperis, be filed in fifteen copies.

When it has been determined that a stay of the mandate is an appropriate course of action, then an original petition only (no copies) to stay the mandate need be filed.

WILLIAM K. SLATE, II
CLERK

Enclosures

Rev. 9-1-76

UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-8064

Henry Albert Smith,

Appellant,

v.

James C. Woodard and Members of the State of North Carolina Parole Commission,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

Submitted: August 17, 1978 Decided: September 11, 1978

Before WINTER, BUTZNER, and RUSSELL, Circuit Judges.

(Henry Albert Smith, Appellant Pro Se. Jacob L. Safron, Special Deputy Attorney General, for the Appellees.)

PER CURIAM:

A review of the record and of the district court's opinion discloses that an appeal from the order of the district court refusing habeas corpus relief would be without merit. Accordingly, although leave to proceed in forma pauperis is granted, a certificate of probable cause to appeal is denied and the appeal is dismissed for the reasons stated by the district court. Smith v. Woodard, C/A No. 77-315-CRT (E.D.N.C., Jan. 5, 1978).

78-5551

JUDGMENT ON DECISION BY THE COURT

FILED

JAN 1

JOHN R. WHITTY, CLERK
U. S. DISTRICT COURT
E. DIST. NO. CAR.

United States District Court

FOR THE

EASTERN DISTRICT OF NORTH CAROLINA

CIVIL ACTION FILE NO. 77-315-CRT

HENRY ALBERT SMITH

vs.

JAMES C. WOODARD, ETC.,

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John D. Larkins, Jr. Chief, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Defendant's motion for summary judgment be, and the same is hereby granted; and this case is hereby DISMISSED; No costs taxed.

THE ABOVE JUDGMENT HAS BEEN ENTERED TODAY, JANUARY 16, 1978, AND A COPY MAILED TO:

Mr. Henry Albert Smith
835 W. Morgan St.
Raleigh, North Carolina

Mr. Jacob L. Safron
Special Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina

The Honorable John D. Larkins, Jr.
Chief, United States District Judge
Eastern District of North Carolina
Trenton, North Carolina

Dated at Raleigh, North Carolina, this 16 th day of January, 19 78 .

JOHN R. WHITTY
Clerk of Court

R W Esmond
Deputy Clerk

78-5551

FILED

JAN

JOHN R. WHITTY, CLERK
U. S. DISTRICT COURT
E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

NO. 77-315-CRT

HENRY ALBERT SMITH)
)
VERSUS) MEMORANDUM OPINION AND ORDER
)
JAMES C. WOODARD, etc.)

LARKINS, CHIEF DISTRICT JUDGE:

This case is before the Court on Defendant's MOTION FOR SUMMARY JUDGMENT. The Plaintiff alleges violations of his constitutional and civil rights have been committed by the Defendant, in that he was denied parole by the North Carolina Parole Commission, which the Defendant chairs; and also that the presence of a detainer filed by the State of Ohio with regard to his parole violation there constitutes double jeopardy.

With regard to the first contention of the Plaintiff, a review of the record in this case reveals no allegations or set of facts which constitute a violation of constitutional dimensions. There has been no abuse of discretion; this conclusion is supported by the realities of the prisoner's confinement status at the time he was considered for parole, and his prison record.

With regard to the plaintiff's seoond contention, the facts support the conclusion and finding that it has no merit. MOODY V DAGGETT, 429 U.S. 78 (1976); GADDY V MICHAEL, 519 F.2d 669 (1975, 4th Cir.).

NOW THEREFORE, in accordance with the foregoing, it is ORDERED that the Defendant's MOTION FOR SUMMARY JUDGMENT be, and the same is hereby GRANTED; and this case is hereby DISMISSED; and the Clerk is to serve copies of this ORDER upon the parties.

AT TRENTON, NORTH CAROLINA

JANUARY 4, 1978

JOHN D. LARKINS, JR.
CHIEF DISTRICT JUDGE

A True Copy, Teste:
John R. Whitty, Clerk
By R. W. Eason
Deputy Clerk

P-034-B

FEB 16 PAGE 19

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

NO. 78-5551

HENRY ALBERT SMITH,

APPELLANT,

V.

JAMES C. WOODARD AND MEMBERS OF THE STATE OF NORTH CAROLINA PAROLE COMMISSION,

APPELLEES.

SUPPLEMENTAL BRIEF

UNIT 4415
CASWELL COUNTY
YANCEYVILLE, NORTH CAROLINA 27379

HENRY ALBERT SMITH # 20120-92
P. O. BOX 217
YANCEYVILLE, NORTH CAROLINA 27379

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

NO. 77-5551

HENRY ALBERT SMITH,

APPELLANT,

V.

JAMES S. WOOLARD AND MEMBERS OF THE STATE OF NORTH CAROLINA PAROLE COMMISSION,

APPELLEES.

SUPPLEMENTAL BRIEF

In further reference to the above captioned case, the appellant has designed as Exhibit D, a letter dated August 25, 1977 that he received from Ms. Mary R. Logan, case analyst, and has attached the same hereto. He has also designed as Exhibit E, a letter dated March 2, 1978 that he received from Sam Boyd, case analyst, and has attached the same hereto.

It should be noted in Exhibit A, B and E, among other things, that the appellees have erroneously denied parole to appellant because he was in close custody and not in honor grade or some other custody levels. Exhibit E stresses this point in that it specifically states that "because you are not now in honor grade, the Commission feels that further consideration of your case should be deferred until you have been promoted to that custody level and demonstrated your willingness and ability to handle the additional freedoms and responsibilities of that custody level."

It must need be reiterated here that the appellant begin serving his 8 to 10 years sentence in the State's Prison at Raleigh, North Carolina on May 30, 1975 and that since that time he has had only one infraction, which I might add, is remarkable in this day and age.

That on or about March 22, 1978, the appellant was transferred from the State's Prison to the Caledonia Prison Farm, Unit 3305. That on April 20, 1978, the prisoners at the Caledonia Prison Farm went on strike and refused to report to their assigned jobs. As a result, they were given write-ups. "... Based on information and belief....', the whole prison population at the Caledonia Prison Farm were given the same or basically the same write-ups. That inasmuch as the appellant had not been assigned to a job, he

received the same write-up as the other prisoners. In a word, the appellant was written-up for refusing to go to a job that he had not been assigned to. However, the question may arise as to the reason why the appellant has not been promoted to that custody level that the Commission has set out in his statement in Exhibit E, wherein he would have been given an opportunity to demonstrate his willingness and ability to handle the additional freedoms and responsibilities of that custody level. Whatever the reason, it is certainly not the results of the action or inaction of the appellant; and he should not have been penalized for matters and things which are invariably in the hands of providence.

In further reference to the statements made and contained in Exhibit E, that: . . . "Your case has been scheduled for review again on or about February 24, 1979", is equivalent to the statement made and contained in Exhibit D, that: ".... Your next parole review date has been scheduled for February 25, 1979"; are just statements without any basic meaning, in so far as the granting of parole in this case is concerned, and are therefore statements that should not be viewed with anything like equanimity.

It appears that the appellees are holding the appellant to the same standards of formal proceedings and pleadings as those drafted by lawyers. Wherefore, the appellant urges the Honorable Court not to hold him to those requirements. Haines v. Kerner, 404 U.S. ___, 92 S. Ct. 594, 30 L.Ed.2d. (12/13/71), cited at 1 CCH 14.

NOTE:

On January 30, 1979, the appellant appeared before the area classification board, at this Unit, 4415, and was informed that he could not be recommended for honor grade until the final disposition of the alleged detainer on file against him from the Adult Probation Authorities, Columbus, Ohio, referred to in the appellant's petition for writ of certiorari, on page 4, etc. It would certainly follow that the reason the appellant has not been promoted to that custody level that would perhaps substantially enhance his chances of making parole, was predetermined by the appellees, to use as a further and continuous basis to justify their denial of parole in this case

Respectfully submitted,

Henry Albert Smith

Appellant

STATE OF NORTH CAROLINA)
COUNTY OF CASWELL) SS:

VERIFICATION

I, Henry Albert Smith, being duly sworn, says: that he is the appellant in the foregoing conclusion; that he has read the foregoing and believes the same is true, except for those matters alleged to be of his own knowledge which are true.

Henry Albert Smith
Appellant

Sworn to and subscribed before me
on February 2, 1979.

Patricia M. Fuquay
NOTARY PUBLIC

My Commission expires 6-15-83 19__.

PROOF OF SERVICE

I hereby certify that on February 2, 1979, that a copy of the foregoing was mailed, postage prepaid, to Rufus L. Edmisten, Respondent, Post Office Box 629 Raleigh, North Carolina 27602

Henry Albert Smith
Appellant

James B. Hunt, Jr.
Governor
James C. Woodard
Chairman

State of North Carolina
Parole Commission
831 W. Morgan Street
Raleigh 27603

Commissioners
Jane S. Greenlee
J. C. Jones
Rae H. McNamara
Henry W. Stedine

Exhibit D.
Copy

August 25, 1977

Mr. Henry Albert Smith, #20128-92 (MRL)
Central #3100

Dear Mr. Smith:

Your next parole review date has been scheduled for February 25, 1978.

Sincerely,

s/
Mary R. Logan
Case Analyst

MRL/bcw

Copy

Exhibit E.

James B. Hunt, Jr.
Governor
James C. Woodard
Chairman

State of North Carolina
Parole Commissioners
831 W. Morgan Street
Raleigh 27603

Commissioners
Jane S. Greenlee
J. C. Jones
Rae H. McNamara
Henry W. Stendine

Copy

March 2, 1978

Mr. Henry Albert Smith, 20128-92 (SB)
Central 3100

Copy

Dear Mr. Smith:

The Parole Commission has carefully considered your case and concluded that parole should not be granted at this time. The Commission, in reaching its decision, took into consideration your present custody level and a detainer filed against you.

Records furnished to us by the Division of Prison reveal that you are presently in close custody.

Because you are not now in honor grade, the Commission feels that further consideration of your case should be deferred until you have been promoted to that custody level and demonstrated your willingness and ability to handle the additional freedoms and

responsibilities of that custody level. The Commission is of the opinion that your continued correctional will substantially enhance your capacity to lead a law-abiding life when released at a later date.

Our records indicate that you have a detainer on file from the state of Ohio. The Commission felt that further consideration of your case should be deferred until proper disposition has been made of the detainer.

Your case has been scheduled for review again on or about February 24, 1979.

Sincerely,

s/
Sam Boyd
Case Analyst

SB/ba

cc: Unit Superintendent

Copy

Supreme Court, U. S.
FILED
JAN 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO 8 5551

HENRY ALBERT SMITH,

Petitioner

v.

JAMES C. WOODARD, et al.,

Respondents

RESPONDENT'S BRIEF

RUFUS L. EDMISTEN
Attorney General

Ben G. Irons, II
Assistant Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: (919) 733-7188

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 78-5551

HENRY ALBERT SMITH,

Petitioner

v.

JAMES C. WOODARD, et al.,

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO REVIEW A DECISION OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

CITATIONS TO OPINION BELOW

The Opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of North Carolina are unreported. Both Opinions are attached to this Response at pp. 12-14.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1343.

QUESTIONS PRESENTED

I. DOES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION APPLY TO DECISIONS TO GRANT OR DENY PAROLE IN NORTH CAROLINA? IF SO, WHAT PROCEDURES ARE CONSTITUTIONALLY REQUIRED?

II. DID THE NORTH CAROLINA PAROLE COMMISSION ARBITRARILY DENY PAROLE TO SMITH BASED ON ERRONEOUS INFORMATION?

III. DOES THE COMMISSION'S CONSIDERATION OF A DETAINER FILED AGAINST SMITH BY OHIO AUTHORITIES VIOLATE SMITH'S CONSTITUTIONAL RIGHTS?

CONSTITUTIONAL PROVISIONS

Petitioner's allegations raise questions involving the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE AND FACTS

Henry Albert Smith, a state court prisoner in the custody of the North Carolina Department of Correction, brought this Civil Rights Action against James C. Woodard, Chairman of the North Carolina Parole Commission and all other members of the Commission. The action was filed in the United States District Court for the Eastern District of North Carolina. Smith alleges that the Commission used vague and insufficient criteria to deny him parole. He also contends that the Commission relied on erroneous information in reaching its decision and that it denied him procedural due proces. Finally, he asserts that the Commission's consideration of a detainer filed against him by Ohio authorities constituted double jeopardy. The Defendants filed Motions to Dismiss and for Summary Judgment along with an Affidavit from James C. Woodard indicating the reasons for parole denial in this case.[1] The District Court found that the Parole Commission had not abused its discretion in reaching its decision and accordingly, it dismissed the complaint. The United States Court of Appeals for the Fourth Circuit affirmed "for the reasons stated by the District Court."[2]

Smith was convicted of assault with a deadly weapon inflicting serious bodily injury on May 30, 1975. He was sentenced to an 8 to 10 year term and began serving his sentence in the North Carolina Department of Correction immediately. He became eligible for parole under North Carolina law on May 30, 1977 when he

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1. See pp. 15-17

2. See pp. 12-14

had served one-fourth of his sentence.[3] Smith was first notified of the denial in a letter dated March 3, 1977 from Mary R. Logan, a Case Analyst for the Parole Commission.[4] The letter stated that the Commission "took into consideration your previous record, your assaultive nature and your custody grade." It also reminded Smith that since he was in close custody, he was ineligible for parole under the Commission's criteria. Finally, it stated that the Commission had noted "prior convictions of assault, burglary, and murder in the second degree." On March 17, 1977, Ms. Logan sent Smith another letter in which she acknowledged that the assault and second degree burglary charges against Smith had been dismissed.[5] Still, she noted that "because of the nature and circumstances of your crime, your custody grade and the fact that you have a detainer filed against you by Adult Probation Authorities, Columbus, Ohio; we do not feel that you deserve parole consideration at this time." Finally, she indicated to Smith that he might be paroled to his detainer filed in Ohio if he were promoted to medium custody.

---

3. N.C.G.S. 148-58, the Statute that determines Smith's status, provided that "all prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence..." North Carolina's current Parole Eligibility Statute, N.C.G.S. 15A-1371 does not apply to persons sentenced before July 1, 1978. See North Carolina Session Laws 1977, c. 711 s. 39, which provides:

> "This Act shall become effective July 1, 1978 and applies to all matters addressed by its provisions without regard to when a Defendant's guilt was established or when judgment was entered against him except that the provisions of Article 85, 'parole' shall not apply to persons sentenced before July 1, 1978."

4. See pp. 18 , infra.

5. See pp. 19 , infra. This letter and the March 3, 1977 letter referred to in n.4 were attached to the Affidavit of James C. Woodard.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT APPLY TO DECISIONS TO GRANT OR DENY PAROLE IN NORTH CAROLINA. IF IT DID, THE PROCEDURES EMPLOYED IN THIS CASE WOULD HAVE BEEN SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE CLAUSE.

Smith claims that the North Carolina Parole Commission has denied him parole without due process. This Court has already agreed to consider a similar contention in Inmates of Nebraska Penal Complex v. Greenholtz, No. 78-201. N.C.G.S. 148-58, the Statute in effect at the time of Smith's sentence,[6] provides:

> All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, a fourth of their minimum sentence, if their sentence is indeterminate; provided that any prisoner serving sentence for life shall be eligible for such consideration when he has served 10 years of his sentence. Nothing in this Section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case on the merits.

We do not believe that this Statute creates any liberty or property interests that would entitle Smith to Due Process. It specifically provides that "nothing in this Section shall be construed as making mandatory the release of any prisoner." In G.S. 148-60, the North Carolina General Assembly added that "the time of releasing prisoners shall be discretionary." In Meachum v. Fano, 427 U.S. 215 (1974) and its companion case Montayne v. Haymes, 427 U.S. 237 (1974), this Court held that the Due Process Clause does not apply to a prisoner's transfer

> "absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." Montayne, supra at 242.

These decisions make it clear to us that for a right to be conferred, the Statute must limit the exercise of administrative discretion. See Lombardo v. Meachum, 548 F.2d 13, 16 (1st Cir. 1977); Four Certain Unnamed Inmates v. Hall, 550 F.2d 1291

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6. See n.1, supra

(1st Cir. 1977). Neither G.S. 148-58 nor G.S. 148-60 nor any other Statute provides standards which control the exercise of the Parole Commission's discretion.[7] The Statutes are general directives that do not confer any rights.

We concede that our analysis of this question has not been universally accepted. The Circuit Courts have analyzed a variety of Parole Eligibility Statutes in a variety of ways.[8] Some Courts agree with us that the Clause does not apply to parole proceedings. Other Circuits have held the Clause applicable, but express differing views on the question of procedures that must be employed in order to meet the requirements of the Clause. Some have held that a statement of reasons for the action taken is sufficient to comply with the Clause.[9] Two Circuits require formal hearings in which the inmate is allowed to appear and "rebut" information that might be adverse to him.[10]

Even if the Due Process Clause is determined to be applicable in this case, procedural requirements have been met.

---

7. It is interesting to note that North Carolina's current Parole Eligibility Statutes, G.S. 15A-1371 et seq., also allow the Commission total discretion.

8. Brown v. Lundgren, 528 F.2d 1050 (5th Cir.) cert. den., 429 U.S. 917 (1976); Scott v. Kentucky Parole Board, No. 74-1899 (6th Cir.) vacated and remanded to consider mootness 429 U.S. 60 (1976).

9. See Franklin v. Shields, 569 F.2d 784, 800 (4th Cir. 1978)(en banc); U.S. ex rel. Johnson v. Chairman New York State Board of Paroles, 500 F.2d 925 (2nd Cir.) vacated as moot 419 U.S. 1015 (1974); U.S. ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir.) cert. den. 425 U.S. 914 (1976).

10. See Childs v. U.S. Board of Parole, 511 F.2d 1270 (D.C.Cir. 1974); Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 576 F.2d 1274 (8th Cir.) cert. granted _____U.S._____, (October 2, 1978).

Smith claims that the Commission has based its decision on vague and insufficient criteria. Actually, the criteria are quite detailed and the investigative process is a thorough one.[11] Smith apparently complains that the criteria set out in the Regulations were not utilized in his case. A brief examination of the Regulations and Ms. Logan's letters however, demonstrate that the criteria were properly applied. The following portions of Regulations are applicable to this case:

(1) The prisoner's previous criminal history provides the Commission with "a means of anticipating the inmate's future behavior as required by G.S. 148-60." 5 NCAC 4C.1602.

(2) "The record of inmates who have been on probation or parole previously is studied carefully...The commission of a new crime while on probation or parole gives the Commission little hope that the inmate will obey the law and conditions of parole." 5 NCAC 4C.1610.

(3) "As a matter of policy the Parole Commission does not grant parole to inmates in close or maximum custody, unless they are being held at that level for their own protection... Normally an inmate in close or maximum custody is there because of conduct that would disqualify him for parole under G.S. 148-60 or because his record is such that he is deemed to be dangerous to others." 5 NCAC 4C.1612.

(4) "The Commission will not grant parole to inmates with charges pending against them The Commission will parole to detainers 'only' when the inmate owes time to another jurisdiction." 5 NCAC 4C.1613.[12]

---

11. The Commission's procedures for investigating cases for parole have been codified and filed with the office of the North Carolina Attorney General in accordance with N.C.G.S. 143B-261.1. 81 pages of this Publication involve the Commission's review and investigation of parole cases. See 5 NCAC 4C and 5 NCAC 4D. These Regulations will be made available to the Court if requested.

12. 5 NCAC .1612 and 5 NCAC.1613 do not prevent Smith's parole to his Ohio detainer. As the Regulations indicate, the Commission does parole prisoners to serve time in other jurisdictions. Moreover, it is not necessary for the prisoner to be in minimum custody prior to parole to a detainer. See Ms. Logan's letter of March 17, 1977 at p. 19 infra. Promotion to medium custody entitles him to consideration for parole.

In Ms. Logan's letter of March 3, 1977 she informed Smith that parole was being denied due to "your previous criminal record, your assaultive nature and your custody grade." In her letter of March 17, 1977, she further informed Smith that "because of the nature and circumstances of your crime, your custody grade and the fact that you have a detainer," parole would be denied. It is clear that the Commission's staff properly utilized legitimate criteria to deny parole to Smith.

Smith also seems to contend that the statement of reasons given to him was too indefinite. We have made it clear however, that there were several definite reasons that were supplied to Smith. He appears to argue that the Commission cannot use his "close custody status" as a reason for parole denial. He apparently believes that parole officials have been responsible for keeping him in close custody and have used his assignment to deny him parole. The Commission however, does not place prisoners in close custody at all. That decision is made by correctional officials. In the Section of its Regulations where it indicates that assignments to close custody will preclude parole, the Commission notes that "normally an inmate is in close custody because of conduct that would disqualify him for parole under N.C.G.S. 148-60 or because his record is such that he is deemed to be dangerous to others." See 5 NCAC 4C .1612. Obviously, parole officials and correctional officials who have made decisions concerning Smith's status are concerned about these same factors. The factors include Smith's previous convictions of second degree murder and assault with a deadly weapon inflicting serious injury and the detainer filed by Ohio based on his violation of parole there. These factors were spelled out to Smith in a letter denying him parole. He is not entitled to a statement of reasons for the reasons. Cf. Fronczak v. Warden El Reno Reformatory, 553 F.2d 1219 (10th Cir. 1977).

It is true that Smith did not receive notice and a pretrial hearing or interview. There are legal and practical reasons for denying hearings in cases such as this one. First, even if the Due Process Clause does apply, the detailed statement of reasons for denial of Smith's parole would satisfy its requirements.

The Defendants are not obligated to hold a hearing in this case. Also, the Court should know that there are approximately 14,000 inmates confined to the North Carolina Department of Correction. The Parole Commission granted paroles to 6,678 inmates between January and November of 1978. It is impossible for the Commission's 5 Members to grant parole interviews to everyone that has served enough time to become eligible. Therefore, where it is obvious that an inmate will not qualify for parole, his case is not considered further. Where there is a possibility that an individual may be paroled, his case will be thoroughly investigated and usually, he will be interviewed.[13] We see no reason to delay parole to a prisoner who deserves it in order to hold hearings for those prisoners who cannot and should not be considered.[14]

It is our hope that the Court will take these practical considerations into account when it decides Inmates of Nebraska Penal Complex v. Greenholtz. We believe that the Court will adequately address the legal and practical problems involved in parole decision making in that case. For that additional reason, there is no need for the Court to review this case further.

II. THE COMMISSION DID NOT ARBITRARILY DENY PAROLE TO SMITH

Smith also claims that he has been denied parole based on erroneous information. The facts belie this contention. As Ms. Logan indicated in her letter of March 17, 1977, several months before Smith was eligible for parole, the Commission fully understood that the assault and burglary charges against Smith had been dismissed. Still, it decided to deny the application because of Smith's criminal history and his

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13. "It is Commission Policy to interview those inmates whose cases have been approved for investigation following a case review by an Analyst or a Member of the Commission." See 5 NCAC 4C.0403(a).

14. See 27 Vanderbilt L.J. 1257, 1276-7 (1974).

assaultiveness. It is obvious that these factors may be legitimately considered. The record shows no abuse of discretion and therefore, the Parole Commission's decision should not be disturbed. Dye v. U.S. Parole Commission, 558 F.2d 1376, 1378 (10th Cir. 1977); Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.) vacated and remanded for consideration of mootness 414 U.S. 809 (1973); U.S.Board of Parole v. Merhige, 487 F.2d 25 (4th Cir. 1973). No Court has limited a Parole Commission's discretionary authority to grant or deny paroles absent arbitrariness. This claim does not raise a substantial question.

III. THE COMMISSION COULD CONSIDER A DETAINER FILED AGAINST SMITH, AND OHIO WAS NOT REQUIRED TO WITHDRAW THAT DETAINER.

Smith's final contention involves the Parole Commission's consideration of detainers filed by Ohio against him for parole violation. The detainer was issued as a result of Smith's assault conviction in North Carolina. In his complaint, he sought an injunction barring the Commission from considering the detainer. Apparently, the District Court liberally construed the complaint as an attack on the validity of the detainer and a request that it be withdrawn. We do not believe that Smith can attack that detainer here. Ohio authorities are not parties to this suit. Even if they were, the United States District Court for the Eastern District of North Carolina has no jurisdiction over them. Therefore, the Court could not order them to hold a revocation hearing or withdraw their detainer. 4 Wright Miller, Federal Practice and Procedure § 1069, pp. 265-6 (West 1970). Assuming arguendo that Smith could properly challenge the detainer in this action, he is certainly entitled to no relief. It now appears settled that a person under parole supervision who commits a crime in another jurisdiction while on parole and is sentenced to prison in that other jurisdiction is not entitled to a prompt revocation hearing following the issuance of a parole violation warrant by the supervising jurisdiction.

Larsen v. McKenzie, 554 F.2d 131 (4th Cir. 1977), Cf. United States ex rel Caruso v. United States Board of Parole, 570 F.2d 1150 (3rd. Cir. 1978); United States ex rel Hahn v. Revis, 560 F.2d 264 (7th Cir. 1977); Hicks v. Board of Parole, 550 F.2d 401 (8th Cir. 1977). The loss that an inmate might suffer as the result of the detainer is considered speculative and remote. The prisoner has had his day in Court and it is extremely unlikely that he will suffer further prejudice. Therefore, unless the State Statute confers a right to a revocation hearing, no right exists. This Court has implied agreement with this proposition in Moody v. Daggett, 429 U.S. 78, 87 (1976). This does not appear to be an appropriate case for the Court to issue a more definite mandate. The jurisdictional problems that Smith faces cannot be overcome.

CONCLUSION

For all of these reasons, this Petition for Discretionary Review is without merit and should be denied.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Ben G. Irons, II
Assistant Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: (919) 733-7188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Petition for Writ of Certiorari to Review a Decision of the Supreme Court of North Carolina has been mailed, Postage Prepaid, to the following: Mr. Henry Albert Smith, P. O. Box 217, Yanceyville, North Carolina 27379.

This the 10th day of January, 1979.

Ben G. Irons, II
Assistant Attorney General

FILED

JAN 5 1978

JOHN R. WHITTY, CLERK
U. S. DISTRICT COURT
E. DIST. NO. CAR.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

NO. 77-315-CRT

HENRY ALBERT SMITH)
)
VERSUS) MEMORANDUM OPINION AND ORDER
)
JAMES C. WOODARD, etc.)

LARKINS, CHIEF DISTRICT JUDGE:

This case is before the Court on Defendant's MOTION FOR SUMMARY JUDGMENT. The Plaintiff alleges violations of his constitutional and civil rights have been committed by the Defendant, in that he was denied parole by the North Carolina Parole Commission, which the Defendant chairs; and also that the presence of a detainer filed by the State of Ohio with regard to his parole violation there constitutes double jeopardy.

With regard to the first contention of the Plaintiff, a review of the record in this case reveals no allegations or set of facts which constitute a violation of constitutional dimensions. There has been no abuse of discretion; this conclusion is supported by the realities of the prisoner's confinement status at the time he was considered for parole, and his prison record.

With regard to the plaintiff's seoond contention, the facts support the conclusion and finding that it has no merit. MOODY V DAGGETT, 429 U.S. 78 (1976); GADDY V MICHAEL, 519 F.2d 669 (1975, 4th Cir.).

NOW THEREFORE, in accordance with the foregoing, it is ORDERED that the Defendant's MOTION FOR SUMMARY JUDGMENT be, and the same is hereby GRANTED; and this case is hereby DISMISSED; and the Clerk is to serve copies of this ORDER upon the parties.

AT TRENTON, NORTH CAROLINA

JANUARY 4, 1978

JOHN D. LARKINS, JR.
CHIEF DISTRICT JUDGE

A True Copy, Teste:
John R. Whitty, Clerk
By R W Eson
Deputy Clerk

P-034-B

UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-8064

Henry Albert Smith,

Appellant,

v.

James C. Woodard and Members of the State of North Carolina Parole Commission,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., District Judge.

Submitted: August 17, 1978 Decided: September 11, 1978

Before WINTER, BUTZNER, and RUSSELL, Circuit Judges.

(Henry Albert Smith, Appellant Pro Se. Jacob L. Safron, Special Deputy Attorney General, for the Appellees.)

PER CURIAM:

A review of the record and of the district court's opinion discloses that an appeal from the order of the district court refusing habeas corpus relief would be without merit. Accordingly, although leave to proceed in forma pauperis is granted, a certificate of probable cause to appeal is denied and the appeal is dismissed for the reasons stated by the district court. Smith v. Woodard, C/A No. 77-315-CRT (E.D.N.C., Jan. 5, 1978).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

Civil 77-315-CRT

HENRY ALBERT SMITH Plaintiff v. JAMES C. WOODARD Defendant	AFFIDAVIT

I, James Woodard, first being sworn, depose and say:

That I am employed by the State of North Carolina as Chairman of the North Carolina Parole Commission. In my capacity as such I am responsible for and have direct access to the Parole records of every inmate in the State Prison System.

Inmate Henry Smith was convicted of assault with a deadly weapon inflicting serious bodily injury on May 30, 1975. He was sentenced to an eight to ten year term by Judge Lee of the Wake County Superior Court. His first parole eligibility date under this sentence was May 29, 1977.

The Parole Commission began to review Inmate Smith's case during February of 1977. On March 3, 1977 Case Analyst Mary Logan informed Inmate Smith of the Parole Commission's decision to deny parole. Miss Logan's letter also set forth the reasons for the denial. A copy of Miss Logan's letter, dated March 3, 1977, is attached hereto and incorporated by reference.

The general policy of the Parole Commission is to parole only those inmates in minimum custody. By achieving minimum custody, an inmate demonstrates a willingness and ability to handle additional freedoms and responsibilities. He demonstrates a respect for prison rules, fellow prisoners and prison officials. The paramount reason for Inmate Smith's parole denial at his last review was the fact that he was in close custody. Close custody is the second most serious custody level in the State Prison System. As the notification letter states "You are in Close Custody, therefore, making you ineligible for parole consideration on your parole eligibility date May 29, 1977."

While Inmate Smith's custody status, standing alone, was sufficient reason for parole denial, the Parole Commission found other negative factors in his case. The fact that this was Inmate Smith's first parole review and that he had therefore served only two years of an eight to ten year sentence, coupled with the Close Custody grade, led the Commission to conclude that his continued correctional treatment would substantially enhance his capacity to lead a law abiding life when released from prison at a later date.

Inmate Smith's prior criminal record and assaultive nature were viewed as negative factors in that these factors made it difficult for the Parole Commission to conclude that, at that time, there was a reasonable probability that he would live and remain in liberty without violating the law if released. Inmate Smith's assaultive nature is evidenced by the crime for which he is currently in prison. Inmate Smith was convicted of assault with a deadly weapon inflicting serious bodily injury after being found guilty of inflicting knife wounds on his girl friend. He has also been convicted of second degree murder in Ohio in 1963.

The March 3, 1977 letter from Miss Logan did state that Inmate Smith had prior convictions for assault and burglary. By letter of March 7, 1977 Inmate Smith questioned the assault and burglary conviction. On March 17, 1977 Miss Logan clarified these issues by return letter notifying Inmate Smith that our records reflected that he had been charged with assault and second degree burglary in 1953 while living in New York but that the indictment was subsequently dismissed. A copy of Miss Logan's letter is attached hereto and incorporated by reference.

Even if Inmate Smith had a perfectly clean record, the Parole Commission's decision would not have been affected in the

slightest. As stated earlier, Inmate Smith's custody grade precluded him from parole.

The detainer filed by the Adult Probation Authorities of Ohio is not being viewed against Inmate Smith. As set forth in Miss Logan's letter of March 17, 1977, the Parole Commission may parole Inmate Smith to this detainer when he reaches medium custody. There is therefore a possibility that parole to the detainer will be granted earlier than parole to the free society. In any event, Inmate Smith is scheduled for another review in February, 1978.

This the 23 day of November, 1977.

James C Woodall
Affiant

Sworn to and subscribed before me
this the 23rd day of November, 1977.

Esta E. Allen
Notary Public

My Commission Expires: My Commission Expires December 5, 1979

March 3, 1977

Mr. Henry Albert Smith, 20128-92, MRL
Central 3100

Dear Mr. Smith:

The Parole Commission has carefully considered your case and concluded that parole should not be granted at this time. The Commission, in reaching its decision, took into consideration your previous criminal record, your assaultive nature and your custody grade.

Our records indicate that you have prior convictions of Assault, Burglary and Murder In The Second Degree. You are in Close Custody, therefore, making you ineligible for parole considerati n on your parole eligibility date May 29, 1977.

Because of your previous criminal involvement and your assaultive nature the Commission was unable to conclude that there is reasonable probability that you will live and remain in liberty without violating the law if paroled at this time. Because you are not now a Honor Grade, the Commission fells that further consideration of your case should be deferred until you have been promoted to that custody level and demonstrated your willingness and ability to handle the additional freedoms and responsibilities of that custody level. The Commission is of the opinion that your continued correctional treatment will substantially enhance your capacity to lead a law-abiding life when released at a later date.

Your file will be reviewed again on February 25,1978.

Sincerely,

Mary R. Logan
Case Analyst

MRL/bw
cc: Unit Superintendent

March 17, 1977

Mr. Henry Albert Smith, 20128-92, MRL
Central 3100

Dear Mr. Smith:

According to our FBI Record, you were charged with Assault and Second Degree Burglary during 1952 while living in Niagara Falls, New York. You were held for trial and indictment was dismissed.

Because of the nature and circumstances of your crime, your custody grade and the fact that you have a detainer filed against you by the Adult Probation Authorities, Columbus, Ohio; we do not feel that you deserve parole consideration at this time. Since you are wanted on a life sentence with the Columbus, Ohio authorities; there is a possibility that the Commission will review your file and consider you for parole to this detainer on your next scheduled review February 25, 1978.

Just as soon as you have been promoted to Medium Custody, please advise this office and we will take your case to the Commission in order to determine whether they want to parole you to this detainer.

Sincerely,

Mary R. Logan
Case Analyst

MRL/bw